
Case No. SC14-1321

IN THE SUPREME COURT OF FLORIDA

OCEAN PALM GOLF CLUB PARTNERSHIP,
Petitioner,

v.

THE CITY OF FLAGLER BEACH, FLORIDA,
Respondent.

On review from the Fifth District Court of Appeal
Case No. 5D12-4274

RESPONDENT'S BRIEF ON JURISDICTION

Michael J. Roper, Esq.
mroper@bellroperlaw.com
Dale A. Scott, Esq.
dscott@bellroperlaw.com
BELL & ROPER, P.A.
2707 East Jefferson Street
Orlando, Florida 32803
Tel: 407-897-5150
Fax: 407-897-3332

Counsel for Respondent

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3. STATEMENT OF THE CASE AND FACTS

Ocean Palm Golf Club Partnership seeks further review of the Fifth District Court of Appeal's opinion. *Ocean Palm Gold Club Partnership v. City of Flagler Beach*, No. 5D12-4274, 139 So.3d 462 (Fla. 5th DCA, May 30, 2014). The Fifth District affirmed Circuit Judge Dennis Craig's final judgment in the City's favor. At the time of trial, Ocean Palm owned the subject 34-acre parcel which for years operated as a golf course. Located entirely within the golf course is a 2.94-acre parcel which for years operated as a driving range, and which is owned by Caribbean Condominium Limited Partnership. Ocean Palm argues the City's refusal to change the long-standing, Comprehensive Plan future land use designation of the two properties, to low-density residential, to allow the development of a residential subdivision, amounted to an unconstitutional "taking."

In its opinion, the Fifth District details the joint, symbiotic efforts of Ocean Palm and Caribbean to develop the 37-acre tract, and described the overlap in ownership between Ocean Palm and Caribbean. At trial, among other arguments, Ocean Palm and Caribbean (who were represented by the same attorneys and jointly presented their case) argued the properties must be considered separately in determining whether a taking has occurred. After hearing the evidence, and considering the two parcels together *and* separately, the trial court found no taking occurred. In this respect, the trial court determined that under *either* scenario, there

were economically beneficial uses of the properties. Ap. 12. The trial court found the testimony of Dr. Henry Fishkind, an economist called to testify by the City, to be persuasive.

On appeal, Ocean Palm continued to argue the City's refusal to amend its Comprehensive Plan constituted a taking. The Fifth District affirmed the lower court's ruling in all respects.

Ocean Palm now claims the Fifth District's opinion "expressly and directly" conflicts with prior Supreme Court precedent. Ocean Palm has shifted its focus to the question of when might a governmental entity be required to relax land use restrictions in light of "physical, economic or social change." Prior cases from this Court show such change concerns changes in the surrounding neighborhood. Also, Ocean Palm continues to argue the trial court and the Fifth District improperly considered the two parcels as a single parcel for purposes of the taking analysis (apparently, disregarding the fact that the trial court analyzed the properties separately and together). Ap. 12-13. As to both points, the Fifth District followed Supreme Court precedent, and thus there is no conflict which might confer jurisdiction here.

4. SUMMARY OF THE ARGUMENT

The Fifth District correctly applied prior Supreme Court precedent. As to POINT I identified in Ocean Palm’s brief on jurisdiction, the Fifth District properly held Ocean Palm failed to show sufficient “physical, economic or social” changes (or, any changes) in the neighborhood surrounding its property to warrant a relaxation of applicable land use regulations, since the evidence at trial showed the character of the properties surrounding the golf course parcel has remained largely the same for decades. As to POINT II, the Fifth District properly considered the two parcels as a single parcel for purposes of the taking analysis, since the owners for years worked together to obtain approval of symbiotic developments on the parcels, Ocean Palm Golf and Caribbean Condo treated the two parcels as one in their application for the Comprehensive Plan amendment at issue, and as the parcels physically constitute a single tract of land (i.e., the Caribbean parcel is located entirely within the Ocean Palm parcel).

5. ARGUMENT

POINT I

Ocean Palm seems to now recognize (or finally concede) there was no affirmative act from the City which amounted to a “taking,” or resulted in the loss of any value. Put simply, the value that existed the day before the City Commission denied the requested Comprehensive Plan change, existed the day after. Ocean Palm is now focusing on an argument that the economics of the situation changed so as to have required the City to relax the land use regulations which applied to the parcels. Ocean Palm argues the Fifth District “misapplied” this Court’s prior decisions in this respect. Ocean Palm is incorrect.

This case is indeed distinguishable from the line of cases which hold that when the character of land surrounding property has changed dramatically over time, the rejection of a request to change the property’s permissible use may be found to be “arbitrary” or “not fairly debatable,” and thus invalid, or might result in a “taking.” See *Tollius v. City of Miami*, 96 So.2d 122 (Fla. 1957) (denial of rezoning of lots located at the corner of a busy intersection for buildings other than single-family dwellings, was an abuse of discretion where the block had become a veritable island, and changes in the neighborhood to commercial purposes required that the restrictions for single-family dwellings be relaxed); *Kugel v. City of Miami Beach*, 206 So.2d (Fla. 3rd DCA 1968), *cert. den.*, 212 So.2d 877 (Fla. 1968), *cert.*

den., 393 US 1021 (1969) (residential property, once surrounded by a quiet neighborhood, over time had become surrounded by commercial activities, thus rendering a residential use totally inappropriate). As the Fifth District stated, “here, the character of the properties surrounding the golf course parcel has remained largely the same for decades—it has long been used for single-and multi-family residences.” Ap. 16-17.

Ocean Palm now asserts the same argument it asserted before the Fifth District, and essentially argues a governmental entity should be the guarantor of a property owner’s ability to make a profit on an investment, by allowing a relaxation of regulations upon request, should the initial use prove unprofitable. Ap. 17. Ocean Palm asserts that the “Fifth District completely ignored the contrary case law from this Court.” Brf. 5. However, these cases in no way support Ocean Palm’s position.

For example, Ocean Palm cites to *City of Miami Beach v. First Trust Co.*, 45 So.2d 681 (Fla. 1949). In *First Trust Co.*, this Court did not undertake to define what variety of “physical, economic or social” circumstances might require a relaxation of land use regulations. Rather, the discussion merely indicated the change must be one that is not “esthetic or a group caprice[.]” *Id.* at 688 (“There must be a positive showing of physical, economic or social change rather than esthetic or a group caprice to justify the release of zoning regulations. They will not

be released at the behest of community of group pressure, if in doing so, constitutional guarantees are undermined.”). Additionally, the ordinance in question “had been in effect 14 years, during which numerous physical, economic and social changes in the locus had taken place.” *Id.* at 688. It cannot be said there were “numerous physical, economic and social changes” which occurred relative to the neighborhood around Ocean Palm’s property.

Ocean Palm then cites to *Forde v. City of Miami Beach*, 1 So.2d 642 (Fla. 1941), wherein this Court held:

Restrictions on private property must be kept within the limits of necessity for the public welfare or it will be recognized as an unlawful taking. *Averne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587, 117 A.L.R. 1110 [(N.Y. 1938)]. And when property, restricted to a defined use by a zoning ordinance, *changes its physical character from natural causes* to the extent that it is no longer adaptable to the use it is zoned for, then it becomes the duty of the zoning board to relax its restrictions to prevent confiscation just as much so as in the case where the regulation was invalid in the first instance. *See State ex rel. Taylor v. Jacksonville*, [133 So. 114 (Fla. 1931)] *supra*; *Ex parte Wise*, 141 Fla. 222, 192 So. 872 [(Fla. 1940)].

Id. at 684 (emphasis added).

Ocean Plan adds that the “changes its physical character” must be considered “without reference to surrounding properties.” Brf. 5-6 (emphasis in original). No such limitation or requirement is stated in *Forde*, or any other case.

Ocean Palm then cites to *Burritt v. Harris*, 172 So.2d 820 (Fla. 1965), wherein this Court stated the “same rule [from *Forde*] applies for changes in the

character of the community have occurred.” *Id.* at 822 (citing *Tollius* at 124, 127). Again, this “rule” does not include a limitation or requirement that changes in character be considered “without reference to surrounding properties”—Ocean Palm is misstating the law in this respect. The fact *Forde* did not involve a consideration of changed neighborhood characteristics does not mean, *ipso facto*, such changes are not to be considered, and *Burritt* does not aid Ocean Palm in this respect. In fact, *Burritt* involved a consideration of neighborhood characteristics (i.e., residential and industrial zones situated near an airport). *Id.* at 822-23. Moreover, at issue in *Forde* were changes in a parcel’s physical character from natural causes (i.e., erosion), as opposed to changes to the surrounding neighborhood. Ocean Palm is mixing apples and oranges via this argument.

There is no precedent to hold that where a land owner becomes unable to turn a profit, such inability amounts to the variety of “physical, economic or social change” which might require a relaxing of land use regulations. As was stated by the Fifth District:

Ocean Palm Golf replies that the changed circumstance on which it is relying is not a change to the surrounding properties, but rather is the change in market and demographic factors: the fact that golf courses across the country are no longer profitable due to the over-construction of golf courses, the aging golf population, and the increased expense involved in operating the golf course. We deem this to be a faulty argument, as it is based on Ocean Palm Golf’s failed economic expectations. In effect, Ocean Palm Golf’s position is that if a landowner buys a piece of property and the economy later takes a

downturn, resulting in the frustration of the landowner's expectations, then the government must act as a guarantor for the landowner's investment after it becomes unprofitable due to, not the zoning regulations, but outside market forces. This is not the purpose of eminent domain law.

Ap. 17.

The Fifth District's ruling in this respect is entirely in line with prior Supreme Court precedent.

POINT II

It first should be recalled that the lower court determined that, whether considered separately or together, the properties had economically beneficial uses, and thus there was no "taking."

That said, the Fifth District, citing to and relying upon *Dept. of Transp., Div. of Admin. v. Jirik*, 498 So.2d 1253 (Fla. 1986) ("*Jirik II*"), found that consideration of the three *Jirik II* factors led to a conclusion that these parcels should be considered as a single parcel. In this respect, the Fifth District explained its reasoning as follows:

It is undisputed that the golf course parcel and the condo parcel are two legally distinct lots. Because the property is separately platted and unoccupied, there is a rebuttable presumption of separateness. *Jirik II*, 498 So. 2d at 1256-57. We believe that the City did, in fact, rebut that presumption. In our view, the unity of use factor weighs in favor of finding that the presumption was rebutted. Historically, the two parcels were a single tract of land, until 1989, at which point the Development Agreement treated them as two distinct tracts. While the two parcels were sold to different owners in 1999, the purchasers

worked together to obtain approval of symbiotic developments on the parcels. And, significantly, Ocean Palm Golf and Caribbean Condo treated the two parcels as one in their application for the Comprehensive Plan amendment.

The unity of ownership factor also weighs in favor of finding that the City rebutted the presumption of separateness. Although the parcels are now owned by different companies, there is substantial overlap in principals and shareholders of those companies. For instance, Stephen Cejner is the principal of both Ocean Palm Golf and Caribbean Condo. Moreover, in the amendment application, the parcels were claimed to be owned by Ocean Palm Golf alone. Ocean Palm Golf made a similar representation in a prior lawsuit.

Lastly, the physical contiguity factor weighs in favor of finding that the City rebutted the presumption of separateness. The two parcels at issue here are uniquely situated—not only are they contiguous, but one is located within the other.

Ap. 15-16.

It is also noteworthy that the *Jirik II* analysis here was performed by the trial court after a bench trial, where plaintiffs were provided a full opportunity to present evidence on this issue.

In closing, Ocean Palm argues the Fifth District opinion “marks a radical departure from Florida law,” relative to *Jirik II*. Brf. 10. This is incorrect. The Fifth District, as to the “unity of ownership” factor, applied the facts of this case to *Jirik II*. And, just because two previous cases (*Mulkey v. Div. of Admin., State Dept. of Transp.*, 448 So.2d 1062 (Fla. 2nd DCA 1984), and *Volusia County v. Niles*, 445 So.2d 1043, 1047 (Fla. 5th DCA 1984)) happened to involve parcels

owned by a single owner, does not mean only such circumstances (i.e., the same record owner) may support a finding of “unity of ownership.” Indeed, the trial evidence here showed overlapping ownership between the parcels. Thus, perhaps unlike other cases which have considered this issue, here the facts showed a unity of ownership between these two parcels although they were, on paper, owned by different entities.

Moreover, the factors in *Jirik II* are to be applied flexibly. *Id.* at 1255. Even if the trial court and Fifth District had determined the “unity of ownership” factor cut in favor of Ocean Palm and a finding of separateness, the “physical contiguity” and “unity of use” factors must be considered. As to “unity of use,” as detailed in the Fifth District opinion, for years these properties had operated as a single economic entity. Ap. 15. As to “physical contiguity,” perhaps most compelling, these properties are entirely contiguous, and the Caribbean parcel (the driving range) is located entirely within and is surrounded on all sides by the Ocean Palm parcel. Ap. 16

The Fifth District’s holding is entirely in accordance with *Jirik II*, and in no way renders *Jirik II* “dead letter” as asserted by Ocean Palm.

CONCLUSION

This Court should deny discretionary review as there is no conflict created by the Fifth District’s opinion.

Respectfully submitted this 2nd day of September, 2014.

BELL & ROPER, P.A.

By: /s/ Dale A. Scott
Michael J. Roper, Esq.
Fla. Bar No. 0473227
mroper@bellroperlaw.com
Dale A. Scott, Esq.
Fla. Bar No. 0568821
dscott@bellroperlaw.com
2707 E. Jefferson St.
Orlando, FL 32803
407-897-5150 (telephone)
407-897-3332 (facsimile)
Counsel for Defendant / Respondent
City of Flagler Beach, Florida

6. CERTIFICATE OF SERVICE

I certify that a copy of this document has been served via e-mail on this 2nd day of September, 2014, upon:

Dennis K. Bayer, Esq.
Primary e-mail: denbayer@aol.com
Secondary e-mail: shwilcott@bellsouth.net
Bayer & Maguire, P.A.
109 South 6th St.
Flagler Beach, FL 32316
Co-counsel for Plaintiff / Petitioner

David Smolker, Esq.
Primary e-mail: davids@smolkerbartlett.com
Secondary e-mail: cristinaf@smolkerbartlett.com
Ethan J. Loeb, Esq.
Primary e-mail: ethanl@smolkerbartlett.com
Secondary e-mail: heatherw@smolkerbartlett.com
Bricklemeyer, Smolker & Bolves, P.A.
500 E. Kennedy Blvd., Ste. 200
Tampa, FL 33602
Co-counsel for Plaintiff / Petitioner

Philip M. Burlington, Esq.
Primary e-mail: pmb@FLAppellateLaw.com
Secondary e-mail: lab@FLAppellateLaw.com
Burlington & Rockenbach, P.A.
Courthouse Commons/Suite 430
444 West Railroad Ave.
West Palm Beach, FL 33401
Co-counsel for Plaintiff / Petitioner

D. Andrew Smith, Esq.
Primary e-mail: dsmith@shepardfirm.com
Secondary e-mail: lsmith@shepardfirm.com
Shepard, Smith & Cassady, P.A.
2300 Maitland Center Pkwy., Ste. 100
Maitland, FL 32751
City Attorney, City of Flagler Beach

BELL & ROPER, P.A.

By: /s/ Dale A. Scott
Michael J. Roper, Esq.
Fla. Bar No. 0473227
mroper@bellroperlaw.com
Dale A. Scott, Esq.
Fla. Bar No. 0568821
dscott@bellroperlaw.com
2707 E. Jefferson St.
Orlando, FL 32803
407-897-5150 (telephone)
407-897-3332 (facsimile)
Counsel for Defendant / Respondent
City of Flagler Beach, Florida

7. CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210, and is submitted in Times New Roman, 14-point font.

BELL & ROPER, P.A.

By: /s/ Dale A. Scott
Michael J. Roper, Esq.
Fla. Bar No. 0473227
mroper@bellroperlaw.com
Dale A. Scott, Esq.
Fla. Bar No. 0568821
dscott@bellroperlaw.com
2707 E. Jefferson St.
Orlando, FL 32803
407-897-5150 (telephone)
407-897-3332 (facsimile)
Counsel for Defendant / Respondent
City of Flagler Beach, Florida